

LBNL – PROCUREMENT STANDARD PRACTICES

Section: 16 Types of Contracts

Subject: 16.3 Letter Subcontracts

PURPOSE: This standard practice (SP) defines the requirements for the use of letter subcontracts.

POLICY: Letter subcontracts are used only when the interests of the Laboratory demand that:

- The subcontractor be given a binding commitment so that work can begin immediately and
- Timely negotiation of a definitive subcontract cannot be accomplished.

Note: Subcontract definitization should be completed within 180 days after a letter subcontract is issued or before 40 percent completion of the scheduled work, whichever occurs first, unless extension of this time requirement is approved in advance by an individual with the appropriate authority. (See SI 1.2, *Delegation of Procurement Authority*.)

SCOPE: This SP applies to all letter subcontracts.

DEFINITION:

Letter Subcontract A letter subcontract is a preliminary contractual document that authorizes immediate commencement of subcontract performance. A letter subcontract is also called a letter agreement.

PROCEDURES:

Parameters All letter subcontracts must meet the following conditions:

- No other type of definitive subcontract is immediately suitable;
- When practicable, a proposal should have been obtained prior to the issuance of the letter subcontract;
- The time frame for formalization of a definitive subcontract is clearly stated with the understanding that the letter subcontract will be superseded, as soon as possible, by a definitive subcontract;
- A definitive statement of work accompanies the letter subcontract, identified as an attachment;
- The same pre-award requirements, such as OCI approvals, justifications, etc., are required as for the definitive subcontract; and

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Terms and Conditions

- The letter subcontract must be signed on behalf of the Laboratory by an individual having signature authority for the total estimated amount of the definitive subcontract.

Letter subcontracts obligate the Laboratory upon execution. It is essential that appropriate terms and conditions be negotiated before execution of the letter subcontract.

Additional Qualifications — Letter subcontracts must contain the following:

- Statement that performance will begin immediately;
- Provisions for termination for the default of the subcontractor or for the convenience of the Laboratory;
- Type of definitive subcontract anticipated;
- Agreement on as many of the Laboratory's standard terms and conditions as possible;
- Agreement regarding obligation of the subcontractor to provide price and cost information as required by the Laboratory;
- Requirement that all parties will expeditiously negotiate in good faith to execute the definitive subcontract;
- Limitation on expenditures;
- Statement of maximum Laboratory liability, i.e., the maximum dollar obligation. This obligation shall not exceed 50% of the estimated cost of the definite subcontract, unless approved in advance by an individual with appropriate signature authority;
- Negotiated definitization schedule;
- An overall price ceiling when based on price competition;
- For subcontracts exceeding \$500,000 for which an SB/SDB subcontracting plan is required, a preliminary subcontracting plan (see SP 19.4, *Subcontracting Plans*); and
- Payment provisions.

The University executes the letter subcontract before sending two copies to the subcontractor for execution. Unless the subcontractor conditions its acceptance, the effective date of the

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subcontract shall be the date of the subcontractor's signature.

Administration

Progress toward definitization of a letter subcontract shall be monitored on a regular basis.

Examples

The attached exhibits are examples of letter subcontracts. Exhibit 16.3a reflects a letter subcontract to be used with cost-type subcontracts. Exhibit 16.3b reflects a letter subcontract to be used with fixed-price subcontracts. These forms may be altered to accommodate the circumstances of specific subcontracts.

REVIEWS/ APPROVALS:

Unless the Laboratory's purchasing delegation provides otherwise, letter subcontracts are subject to the same approvals as the corresponding definitive subcontracts. See SI 1.2, *Delegation of Procurement Authority*.

RESPONSIBILITIES:

Procurement Specialist

The procurement specialist shall:

- Determine when a letter subcontract is appropriate and in the best interests of the Laboratory and
- Adhere to the requirements for using letter subcontracts as outlined herein.

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Exhibit: 16.3.a Example of Letter Subcontract for Cost-Type Subcontracts

LETTER SUBCONTRACT

**BETWEEN
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
AND**

HEREINAFTER CALLED THE “SUBCONTRACTOR”

Effective Date:

Subcontract For:

A Letter Subcontract is hereby placed with the Subcontractor by The Regents of the University of California, a constitutional corporation and instrumentality of the State of California, hereinafter called the “University,” operating contractor of [*Laboratory Name*] under contract number W-7405-Eng [*Contract No.*] issued by the United States Government represented by the Department of Energy, for furnishing the supplies or services and subject to the provisions set forth in Attachment 1, attached hereto and hereby made a part hereof. Reference in any of the clauses set forth in the Attachment to subcontract prices or adjustment to subcontract prices and delivery schedules to the extent such are not specifically included in this Letter Subcontract, shall be inapplicable, except that any adjustments in amounts finally payable to the Subcontractor, or in time of performance required by such clauses, shall be taken into account at the time of execution of the definitive subcontract contemplated herein. If this Letter Subcontract is terminated prior to definitization, any adjustments in amounts finally payable to the Subcontractor or in time of performance required by the clauses set forth in Attachment 1 shall be made at the time of settlement of the termination.

The Subcontractor's acceptance of this Letter Subcontract will be indicated by affixing its signature to two copies hereof and returning those copies to the [*Title*] not later than [*Date*].

Upon acceptance by both parties, the Subcontractor shall proceed with performance of the work described herein, including procurement of necessary materials. Acceptance by both parties shall be established by the University entering the effective date on the signed copies and returning one of the signed copies to the Subcontractor. (See clause below entitled “Effective Date.”)

1. Limitation of University Liability

- (A) The Subcontractor is not authorized to make expenditures or to incur obligations in the performance of this subcontract which exceed [*amount*].
- (B) The maximum amount for which the University shall be liable if this subcontract is terminated is [*amount*].

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Exhibit: 16.3.a Example of Letter Subcontract for Cost-Type Subcontracts

Letter Subcontract _____

2. Definitization

- (A) A [*contract type*] of definitive subcontract is contemplated. The Subcontractor agrees to begin negotiating promptly with the University the terms of a definitive subcontract, which will include all clauses required by the University on the date of execution of this Letter Subcontract, all clauses required by public law on the date of execution of the definitive subcontract and such other clauses, terms, and conditions as may be mutually agreeable. The Subcontractor has submitted a proposal [*number*], with a proposed total amount of [*amount*] [*or agrees to submit a proposal and cost or pricing data supporting its proposal*]. This proposal shall be the basis for negotiation of a definitive subcontract for the effort.
- (B) The schedule for definitization of this Letter Subcontract is set forth below.

Milestone

Schedule

Complete negotiations

Definitive subcontract sent to
Subcontractor for review and signature

Definitive subcontract signed by the
Subcontractor and returned to
[*Laboratory Name*]

Definitive subcontract signed by the
University of California

- (C) If agreement on a definitive subcontract to supersede this Letter Subcontract is not reached by the target date set forth in 2(B) "Definitization" above or any extension thereof by the University, the University may determine a reasonable price or fee in accordance with Subpart 15.8 and Part 31 of the Federal Acquisition Regulations and Subparts 915.8 and 915.9 of the Department of Energy Acquisition Regulations, subject to appeal by the Subcontractor as provided in the "Disputes" clause. In any event, the Subcontractor shall proceed with completion of the subcontract, subject only to the "Limitation of University Liability" clause. After the date of the University's determination of price or fee, the subcontract shall be governed by:

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Exhibit: 16.3.a Example of Letter Subcontract for Cost-Type Subcontracts

Letter Subcontract _____

- (1) All clauses required by the University on the date of execution of the Letter Subcontract for either a fixed-price type subcontract or a cost-reimbursement type subcontract as determined by the University under this paragraph (C);
- (2) All clauses required by law as of the date of the University's determination; and
- (3) Any other clauses, and terms and conditions mutually agreed upon.

To the extent consistent with the foregoing, all clauses, terms and conditions included in this Letter Subcontract except which by their nature are applicable only to a Letter Subcontract shall continue to be effective.

3. Effective Date

The term "Effective Date" as used herein *shall be the date of the Subcontractor's signature*. However, if the Subcontractor conditions its execution of the Letter Subcontract and, as a result thereof, the Letter Subcontract is revised, the effective date shall be the date the Subcontractor's copy of the revised Letter Subcontract, as agreed to by the Subcontractor and the University, is returned to the Subcontractor.

The University shall insert the effective date on page 1 hereof in accordance with the above.

4. Payments of Allowable Costs Before Definitization

- (A) *Reimbursement Rate*. Pending the placing of the definitive subcontract referred to in this Letter Subcontract, the University shall promptly reimburse the Subcontractor for all allowable costs under this subcontract at the following rates:
- (1) One-hundred percent of approved costs representing progress payments to lower-tier subcontractors under fixed-price lower-tier subcontracts; provided, that the University's payments to the Subcontractor shall not exceed 80% of the allowable costs of those lower-tier subcontractors.
 - (2) One-hundred percent of approved costs representing cost-reimbursement lower-tier subcontracts; provided, that the University's payments to the Subcontractor shall not exceed 85% of the allowable cost of those lower-tier subcontractors.
 - (3) Eighty-five percent of all other approved costs.

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Exhibit: 16.3.a Example of Letter Subcontract for Cost-Type Subcontracts

Letter Subcontract _____

- (B) *Limitation of Reimbursement.* To determine the amounts payable to the Subcontractor under this Letter Subcontract, the University shall determine allowable costs in accordance with the applicable cost principles in Part 31 of the Federal Acquisition Regulations. The total reimbursement made under this paragraph shall not exceed 85% of the maximum amount of the University's liability, as stated in this subcontract.
- (C) *Invoicing.* Payments shall be made promptly to the Subcontractor as work progresses, but (except for small business concerns) not more often than every two weeks, in amounts approved by the University. The Subcontractor may submit an invoice or voucher in such form and reasonable detail as required by the University supported by a statement of the claimed allowable cost incurred by the Subcontractor in the performance of this subcontract.
- (D) *Allowable Costs.* For the purpose of determining allowable costs, the term "costs" includes:
- (1) Those recorded costs that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the subcontract;
 - (2) When the Subcontractor is not delinquent in payment of costs of subcontract performance in the ordinary course of business, costs incurred, but not necessarily paid for:
 - (a) Materials issued from the Subcontractor's stores inventory and placed in the production process for use on the subcontract;
 - (b) Direct labor;
 - (c) Direct travel;
 - (d) Other direct in-house costs; and
 - (e) Properly allocable and allowable indirect costs as shown on the records maintained by the Subcontractor for purposes of obtaining reimbursement under government contracts; and
 - (3) The amount of progress payments that have been paid to the Subcontractor's lower-tier subcontractors under similar costs standards.
- (E) *Small Business Concerns.* A small business concern may receive more frequent payments than every two weeks and may invoice and be paid for recorded costs for items or services purchased directly for the subcontract, even though it has not yet paid for such items or services.

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Exhibit: 16.3.a Example of Letter Subcontract for Cost-Type Subcontracts

Letter Subcontract _____

5. **The [procurement specialist's] name and address is:**

[Name]

University of California

[Laboratory Name and Address]

For: The Regents of the University of California

By: _____

Name: _____

Title: _____

Date: _____

Accepted: Subcontractor

By: _____

Name: _____

Title: _____

Date: _____

This Letter Subcontract is composed of this document and Attachment 1, the subcontract Schedule.

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Exhibit: 16.3.b Example of Letter Subcontract for Fixed-Price Subcontracts

LETTER SUBCONTRACT

**BETWEEN
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
AND**

HEREINAFTER CALLED THE “SUBCONTRACTOR”

Effective Date:

Subcontract For:

A Letter Subcontract is hereby placed with the Subcontractor by The Regents of the University of California, a constitutional corporation and instrumentality of the State of California, hereinafter called the “University,” operating contractor of [*Laboratory Name*] under contract number W-7405-Eng [*Contract No.*] issued by the United States Government represented by the Department of Energy, for furnishing the supplies or services and subject to the provisions set forth in Attachment 1, attached hereto and hereby made a part hereof. Reference in any of the clauses set forth in the Attachment to subcontract prices or adjustment to subcontract prices and delivery schedules to the extent such are not specifically included in this Letter Subcontract, shall be inapplicable, except that any adjustments in amounts finally payable to the Subcontractor, or in time of performance required by such clauses, shall be taken into account at the time of execution of the definitive subcontract contemplated herein. If this Letter Subcontract is terminated prior to definitization, any adjustments in amounts finally payable to the Subcontractor or in time of performance required by the clauses set forth in Attachment 1 shall be made at the time of settlement of the termination.

The Subcontractor's acceptance of this Letter Subcontract will be indicated by affixing its signature to two copies hereof and returning those copies to the [*Title*] not later than [*Date*].

Upon acceptance by both parties, the Subcontractor shall proceed with performance of the work described herein, including procurement of necessary materials. Acceptance by both parties shall be established by the University entering the effective date on the signed copies and returning one of the signed copies to the Subcontractor. (See clause below entitled “Effective Date.”)

1. Limitation of University Liability

- (A) The Subcontractor is not authorized to make expenditures or to incur obligations in the performance of this subcontract which exceed [*amount*].
- (B) The maximum amount for which the University shall be liable if this subcontract is terminated is [*amount*].

2. Definitization

- (A) A [*contract type*] of definitive subcontract is contemplated. The Subcontractor agrees to begin negotiating promptly with the University the terms of a definitive subcontract, which

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Exhibit: 16.3.b Example of Letter Subcontract for Fixed-Price Subcontracts

Letter Subcontract _____

will include all clauses required by the University on the date of execution of this Letter Subcontract, all clauses required by public law on the date of execution of the definitive subcontract and such other clauses, terms, and conditions as may be mutually agreeable. The Subcontractor has submitted a proposal [*number*], with a proposed total amount of [*amount*] [*or agrees to submit a proposal and cost or pricing data supporting its proposal*]. This proposal shall be the basis for negotiation of a definitive subcontract for the effort.

- (B) The schedule for definitization of this Letter Subcontract is set forth below.

<u>Milestone</u>	<u>Schedule</u>
Complete negotiations	
Definitive subcontract sent to Subcontractor for review and signature	
Definitive subcontract signed by the Subcontractor and returned to [<i>Laboratory Name</i>]	
Definitive subcontract signed by the University of California	

- (C) If agreement on a definitive subcontract to supersede this Letter Subcontract is not reached by the target date set forth in 2(B) "Definitization" above or any extension thereof by the University, the University may determine a reasonable price in accordance with Subpart 15.8 and Part 31 of the Federal Acquisition Regulations and Subparts 915.8 and 915.9 of the Department of Energy Acquisition Regulations, subject to appeal by the Subcontractor as provided in the "Disputes" clause. In any event, the Subcontractor shall proceed with completion of the subcontract, subject only to the "Limitation of University Liability" clause. After the date of the University's determination of price, the subcontract shall be governed by:

- (1) All clauses required by the University on the date of execution of the Letter Subcontract for either a fixed-price type subcontract or a cost-reimbursement type subcontract as determined by the University under this paragraph (C);
- (2) All clauses required by law as of the date of the University's determination; and
- (3) Any other clauses, and terms and conditions mutually agreed upon.

To the extent consistent with the foregoing, all clauses, terms and conditions included in this Letter Subcontract except which by their nature are applicable only to a Letter Subcontract shall continue to be effective.

Letter Subcontract _____

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Exhibit: 16.3.b Example of Letter Subcontract for Fixed-Price Subcontracts

3. Effective Date

The term "Effective Date" as used herein *shall be the date of the Subcontractor's signature*. However, if the Subcontractor conditions its execution of the Letter Subcontract and, as a result thereof, the Letter Subcontract is revised, the effective date shall be the date the Subcontractor's copy of the revised Letter Subcontract, as agreed to by the Subcontractor and the University, is returned to the Subcontractor.

The University shall insert the effective date on page 1 hereof in accordance with the above.

4. Payments Before Definitization

[*To be negotiated prior to issuance of the letter subcontract.*]

5. The [procurement specialist's] name and address is:

[*Name*]
University of California
[*Laboratory Name and Address*]

For: The Regents of the University of California

By: _____

Name: _____

Title: _____

Date: _____

Accepted: Subcontractor

By: _____

Name: _____

Title: _____

Date: _____

This Letter Subcontract is composed of this document and Attachment 1, the subcontract Schedule.